Serra v The Queen [2004] NTCCA 3

PARTIES:	NELIO AVELINO DASILVA SERRA v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 4 of 2002 (20107281) and (20104058)
DELIVERED:	3 June 2004
HEARING DATES:	12 May 2004
JUDGMENT OF:	MILDREN, BAILEY and RILEY JJ

CATCHWORDS:

CRIMINAL LAW – Jurisdiction, practice and procedure – Judgment and punishment – Defendant appeal against sentences imposed – Judge erred in law – Judge misled by submissions of counsel for the Crown – Misinformation not corrected by counsel for the appellant

LEGISLATION

Sentencing Act s 5(2)(n), s 5(2)(p), s 53 and s 59
Criminal Code s 411(4)

CASES

Postiglione v The Queen (1996-1997) 189 CLR 295 at 308
R v Nelio Avelino DaSilva Serra (1996) 92 A Crim R 511
Damaso v The Queen (2002) 130 A Crim R 206

REPRESENTATION:

Counsel:

Appellant:	S.J. Cox
Respondent:	W.J. Karczewski QC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Serra v The Queen [2004] NTCCA 3
No CA 4 of 2002 (20107281) and (20104058)

BETWEEN:

NELIO AVELINO DASILVA SERRA
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, BAILEY and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 3 June 2004)

THE COURT:

[1] In January 2002 the appellant was sentenced to imprisonment for a total of seven years in relation to offences of unlawful entry and stealing which were committed in January 2001 and May 2001. Other offences which occurred in May 2001 were taken into account in that process. On 6 August 2003 the appellant was sentenced to a further term of imprisonment of seven years and six months to be served concurrently with the earlier sentence in relation to three counts of unlawful entry with intent to steal, two counts of stealing associated with the break-ins and one count of

unlawful use of a motor vehicle with the intent of using it for the commission of an offence. The appellant appeals against each of the sentences imposed.

[2] In relation to the sentence imposed in January 2002 the appellant pleaded guilty to having unlawfully entered an occupied dwelling in Smith Street, Darwin, at night with the intention of stealing and also to having stolen a cosmetic bag, a wallet and their contents. At the same time the appellant pleaded guilty to two further counts on an ex officio indictment, being the aggravated unlawful entry of a building in Bishop Street, Woolner, with intent to steal and stealing therefrom computers and computer equipment valued at $18,000.

[3] In addition to the matters set out in the indictments the learned sentencing judge was asked to take into account five offences, namely having custody of personal items suspected of being stolen or otherwise unlawfully obtained, possession of a category A firearm which was unlicensed and possession of a firearm whilst failing to comply with storage and safety keeping requirements. He also admitted possession of .22 calibre ammunition without a licence. His Honour took those offences into account.

[4] In sentencing the appellant the learned sentencing judge noted his extensive criminal record which extended to some 11 pages and included numerous convictions for unlawful entry, stealing, criminal damage and similar offences. His Honour observed that the appellant had been incarcerated on a

number of occasions and his record was "littered with breaches of bond and breaches of probation". He noted that in July 1996 the appellant was convicted of armed robbery and sentenced to nine years imprisonment with a non-parole period of four years and six months. The appellant was released on parole on 18 August 2000 and all of the subsequent offending occurred whilst he was on parole. Having been arrested in relation to the January 2001 offences he was released on bail and whilst on bail committed the offences of May 2001.

[5] The appellant was self-represented at this time and sought bail to enable him to prepare his case. He was granted bail limited to allowing him to attend at the Supreme Court between 10 am and 4 pm on four dates to prepare for trial. On one of those dates he absconded from the Supreme Court. He committed further offences whilst at large. He was subsequently arrested and his parole was revoked. In passing sentence the learned sentencing judge observed:

> "Between 1989 and 1996 the prisoner had about 58 prior convictions for property offences, driving offences, and one offence against a person. There were eight convictions for breach of bond, escaping lawful custody, and the like. The prisoner has shown, over a long period, complete contempt for other people, for their property and for the law. He has repeatedly thumbed his nose at the courts. In the past he has been given every opportunity to redeem himself. He has now come to the end of the road. He deserves, and will receive, stern punishment. He is a determined recidivist. I have not the slightest doubt that, were he to be released today, he would re-offend within a very short period."

[6] His Honour went on to detail the personal circumstances of the appellant and noted that both general and personal deterrence were prime considerations in the sentencing process. He imposed a total penalty of seven years imprisonment.

[7] Unfortunately, in determining the sentence to be imposed on this occasion, his Honour was misled by the submissions of counsel for the Crown and that misinformation was not corrected by counsel for the appellant. In this Court it was agreed between the appellant and the respondent that his Honour had been led into error.

[8] The error related to the manner in which his Honour dealt with the revocation of the parole previously granted to the appellant in respect of the sentence imposed for the armed robbery. There remained a period of four years and six months imprisonment to be served in relation to the earlier sentence. The attention of his Honour was directed towards that matter but he was advised to ignore it for the purposes of sentencing in the matters then before him. He was told that "totality is not a consideration for this court in relation to that breach of parole, they are separate matters". His Honour proceeded to sentence on that basis.

[9] The advice provided to his Honour was clearly in error. Section 5 of the Sentencing Act sets out the sentencing guidelines applicable for present purposes. Section 5(2)(p) provides that in sentencing an offender a court shall have regard to:

> "sentences that the offender is liable to serve because of the revocation of orders made under this or any other Act for contraventions of conditions by the offender."

[10] Section 5(2)(n) of the Sentencing Act provides that in sentencing an offender the court shall also have regard to:

> "sentences already imposed on the offender that have not been served".

[11] These provisions were not drawn to the attention of his Honour and there was no discussion of their effect upon the sentence to be imposed. The learned sentencing judge proceeded on the basis that the sentence that the appellant was liable to serve because of the revocation of the parole order was irrelevant to the matters before him. In those circumstances counsel for the respondent correctly conceded that the sentencing judge was led into error.

[12] The sentence to be imposed upon the appellant by his Honour was to be cumulative upon the sentence which the appellant was then serving. By operation of s 59 of the Sentencing Act, where an offender has been sentenced to serve several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender is to first serve the term or terms in respect of which a non-parole period was not fixed, then any non-parole period and then the balance of the term unless, of course, he is released on parole.

[13] In determining the appropriate sentence for a person such as the appellant it is necessary for a court to take into account the total period to be spent in custody and not just the period of the sentence then to be imposed. In so doing the court is able to mitigate "what strict justice would otherwise indicate" and thereby avoid a sentence that is crushing: *Postiglione v The Queen* (1996-1997) 189 CLR 295 at 308.

[14] It follows that in relation to the sentence imposed on 15 January 2002 error occurred. It was necessary for his Honour to have had regard to the sentence imposed in respect of the armed robbery and in particular to the fact that the appellant had a period of four years and six months to serve on that sentence. He did not do so.

[15] When the appellant came before the learned sentencing judge on 6 August 2003 it was for three counts of aggravated unlawful entry of buildings with intent to steal. In addition, he pleaded guilty to two counts of stealing associated with the unlawful entries and one count of unlawful use of a motor vehicle with the intent of using it for the commission of an offence. In relation to counts one and two on the indictment the appellant broke into premises and stole $25. On the same night he broke into another set of premises (count three) but there was no associated stealing charge on that occasion. The offences in relation to counts four, five and six occurred a few days later. The appellant entered the Darwin City Council depot and stole a security safe, two regulators, a hose assembly, a camera, a hand-held radio, cash and keys all being the property of Darwin City Council. The

property was removed by the unlawful use of a motor vehicle belonging to the Darwin City Council. The combined value of the property taken and the cost of necessary relocking and replacement of keys was $20,153.38.

[16] As we have noted above, this offending occurred whilst the appellant was at large having absented himself from the Supreme Court in breach of bail conditions. The appellant was also on parole at the time.

[17] In sentencing the appellant on this occasion the learned sentencing judge referred to and adopted passages from a previous sentencing matter involving the appellant which is reported at (1996) 92 A Crim R 511. His Honour adopted without repeating his sentencing remarks of January 2002 and observed that: "I see no reason why a non-parole period should be fixed in respect of any sentence I pass today, for the reasons I gave in January 2002". Neither the Crown nor counsel for the defence corrected the error that had occurred on the earlier occasion and his Honour proceeded to sentence on the basis that the imprisonment for which the appellant was then liable for breach of parole was not to be taken into account in determining the appropriate sentence. His Honour imposed a sentence of imprisonment of seven years and six months and directed that the sentence be served concurrently with the earlier sentence of January 2002. In effect, the appellant was required to serve an extra six months in prison, that being the period by which the second sentence exceeded the first. His Honour declined to fix a non-parole period.

[18] For the reasons expressed above the sentence was imposed in error and this was acknowledged to be so by the respondent.

[19] The fact that error has occurred in the sentencing process does not of itself provide a sufficient basis for this Court to allow the appeal and re-sentence the appellant. Section 411(4) of the Criminal Code requires the court to form a positive opinion that some other sentence is warranted in law and should have been passed: *Damaso* (2002) 130 A Crim R 206. In our view the manner in which the learned sentencing judge was misled resulted in him imposing a sentence which, when considered with the balance of the sentence that the appellant was liable to serve because of the revocation of parole orders, was too severe. We therefore set aside the sentences imposed and re-sentence the appellant. In so doing we adopt the sentencing remarks made by the learned sentencing judge.

[20] The learned sentencing judge declined to set a non-parole period when sentencing the appellant. In our view the approach he adopted was correct. At the time of sentencing on each occasion the appellant presented as a man who had a large number of convictions which included numerous breaches of court orders and the commission of offences whilst on parole and on bail. He had been assessed by a psychiatrist as suffering from an antisocial personality disorder. The psychiatrist observed that he was not aware of any psychiatric intervention which could correct the "flawed personality" of the appellant. Whilst it was acknowledged that for some people with antisocial personalities a process of belated psychological maturation occurs, the

psychiatrist said that it can "hardly be stated that such favourable progress is readily discernible with this man at this stage".

[21] Section 53 of the Sentencing Act provides that where a court sentences an offender to be imprisoned for 12 months or longer and the sentence is not suspended in whole or in part the court shall, as part of the sentence, fix a period during which the offender is not to be released on parole unless it considers that the nature of the offence, the history of the offender or the circumstances of the particular case make fixing of such a period inappropriate. In this case we are of the opinion that the criminal history of the appellant does make the fixing of a non-parole period inappropriate.

[22] Turning to the matters dealt with in January 2002. We take into account the offences set out in the schedule being the five offences that occurred in May 2001. In relation to the offences of aggravated unlawful entry and stealing committed on 28 January 2001 the appellant is sentenced to the aggregate term of imprisonment of three years. For the offences of aggravated unlawful entry and stealing committed in May 2001 the appellant is sentenced to the aggregate term of imprisonment of three years. Having considered the totality principle in relation to the offending in 2001 we direct that the sentences be served concurrently as to two years, giving a total sentence of imprisonment in respect of that offending of four years.

[23] Turning then to the matters dealt with in August 2003. We agree with the learned sentencing judge that these matters are both more numerous and

more serious than the earlier offending. We propose to adopt the approach taken by his Honour and impose an aggregate sentence. The appellant will be sentenced to imprisonment for a period of five years.

[24] The total sentence is therefore imprisonment for nine years. In addition the appellant has a period of four years and six months imprisonment to serve in respect of the cancelled parole. Taken cumulatively those sentences add up to what amounts to a crushing sentence. In order to address that issue, we direct that the sentences of five years and four years imprisonment be served concurrently as to three years, giving a total head sentence in respect of all of the offending of imprisonment for six years. For the reasons already expressed we do not set a non-parole period. The sentences will be backdated to the commencement date identified by the learned sentencing judge in relation to the earlier offending, being 6 October 2001.

[25] Leave to appeal is granted. The appeal in each case is allowed and the sentence of imprisonment set aside. In summary, the appellant is sentenced to imprisonment for a total period of six years deemed to have commenced on 6 October 2001.

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